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IN THE SUPREME COURT OF THE UNITED STATES

Term, 195 No.

COMMONWEALTH OF PENNSYLVANIA
EX REL EDWARD HAINES,

Petitioner

v.

CORNELIUS J. BURKE, Warden,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Edward Haines, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in the above entitled case on September 23, 1953 denying a petition for the allowance of an appeal from the Superior Court of the Commonwealth of Pennsylvania.

OPINION BELOW

The opinion of Henninger, President Judge of the Court of Common Pleas of Lehigh County is unreported but a copy of said opinion is appended to the certified copy of the record filed with this petition. The opinion of the Superior Court of the Commonwealth of Pennsylvania is reported in 173 Pa. Super. 477. A copy of said opinion of the Superior Court is appended to the certified record filed with this petition.

JURISDICTION

The order of the Supreme Court of the Commonwealth of Pennsylvania was entered on September 23, 1953, refusing a Petition for the Allowance of an Appeal from the Superior Court of the Commonwealth of Pennsylvania. The Superior Court of the Commonwealth of Pennsylvania entered an opinion and order on July 14, 1953, affirming an opinion and order entered by the Court of Common Pleas of Lehigh County, Commonwealth of Pennsylvania, denying petitioner's Petition for a Writ of Habeas Corpus. The jurisdiction of this court is invoked under 28 U S C, Section 1257.

Petitioner filed his petition for a Writ of Habeas Corpus in the Court of Common Pleas of Lehigh County, Commonwealth of Pennsylvania, on January 3, 1952, averring that he had been denied rights guaranteed to him by the "Due Process of Law" clause of the Fourteenth Amendment to the United States Constitution. Said Petition was denied upon Petition and Answer by said Court of Lehigh County on March 10, 1952.

On May 14, 1952, a Certiorari from the Superior Court of the Commonwealth of Pennsylvania was directed to the Court of Common Pleas of Lehigh County. On July 14, 1953, the Superior Court of the Commonwealth of Pennsylvania affirmed the action of the Court of Common Pleas of Lehign County, holding that the petitioner was not denied rights guaranteed to him by the Fourteenth Amendment to United States Constitution. On August 26, 1953, a Petition for the Allowance of an Appeal from the Superior Court to the Supreme Court of the Commonwealth of Pennsylvania was filed by your petitioner and on September 23, 1953, the said Supreme Court denied the Petition for the Allowance of an Appeal.

QUESTIONS PRESENTED

1. Whether the doctrine of "Effective Representation" as enunciated by this Honorable Court in Powell v. Alabama, 287 U. S. 45, applies to non-capital cases arising in State criminal courts.

2. Whether an accused who is brought to trial on four separate bills of indictment and is unable to afford counsel on his own behalf, and fifteen minutes before he is brought to trial a State Court appoints a lawyer to represent the said accused and the accused has not an opportunity to confer with counsel nor to arrange for the issuance of subpoenae for witnesses on his behalf, and the accused is subsequently found guilty of the offenses charged and is sentenced to 27½ years to 55 years in the State Penitentiary, has been deprived of his liberty without due process of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

3. Whether an accused who is charged with four separate and distinct crimes and is brought to trial at the one time for the said four separate and distinct offenses has been deprived of his liberty without due process of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court and the Superior Court of the Commonwealth of Pennsylvania erred:

1. In failing to accord Petitioner a hearing upon the merits of his petition.

2. In failing to hold that the petitioner was denied "Due Process of Law" because he was brought to trial within fifteen minutes after counsel had been appointed for him and without adequate opportunity to confer with counsel, nor to summon witnesses on his behalf.

3. In failing to hold that Petitioner had been denied his liberty without due process of law where petitioner had been tried at the one time for four separate and distinct offenses.

4. In affirming the order of the Court of Common Pleas of Lehigh County.

STATEMENT

Petitioner, an inmate of the Eastern State Penitentiary, situated in the Commonwealth of Pennsylvania, filed his petition for a Writ of Habeas Corpus on January 3, 1952, in the Court of Common Pleas of Lehigh County, Commonwealth of Pennsylvania. The petition therein filed set forth that on January 5, 1943, the Grand Jury for the County of Lehigh, Commonwealth of Pennsylvania, returned true bills of indictment under Bills Nos. 50, 51, 52 and 53, charging the petitioner with the crimes of Robbery while Armed, Robbery, Assault with Intent to Rob, Demanding Property by Means of Force, Assault and Battery, Larceny, Rape and Assault with Intent to Ravish.

The Commonwealth in its bills of Indictment charged the petitioner with having held up at point of gun four separate couples in parked cars between August 11, 1942, and September 24, 1942. In three of the cases he was charged with having bound the man and raped the woman.

The petition further alleged that petitioner was brought to trial on January 6, 1943, one day after he had been indicted. Petitioner, who spent approximately three months in jail pending trial, was not represented by counsel because he was without funds. Fifteen minutes before petitioner was brought to trial the Trial Judge appointed a member of the bar of Lehigh County to represent pettioner.

The petition averred that he was not accorded proper time in which to confer with counsel nor to prepare his defense, nor did he have proper time in which to summon witnesses.

On January 8, 1943, the Petit Jury returned verdicts of "Guilty" on all bills of Indictment. On January 8, 1943, the Honorable Richard W. Iobst, Judge of the Court of Oyer and Terminer and Quarter Sessions of Lehigh County sentenced the petitioner to seven and one-half years to fifteen years as to Bill Number 50, seven and one-half to fifteen years as to Bill Number 51, seven and one-half years to fifteen years as to Bill Number 52 and five years to ten years as to Bill Number 53.

Petitioner averred in his petition that by virtue of his being brought to trial without adequate preparation of his defense by his Court-appointed lawyer, he was not accorded a fair trial and as such was deprived of his liberty without due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

Petitioner further alleged that he was entitled to separate trials on all bills of Indictment because they charged separate and distinct offenses: that his being tried on all of them at the same time was prejudicial to and therefore deprived him of his liberty without due process of law.

On January 3, 1952, the Court of Common Pleas of

Lehigh County entered a rule upon Cornelius J. Burke, Warden of the Eastern State Penitentiary to show cause why a Writ of Habeas Corpus should not be granted.

An Answer was filed on behalf of the Warden in this proceeding, stating that the matters raised in the petition were questions of the law and that the Respondent therefore made no Answer thereto.

On March 10, 1952, in an opinion written by the Honorable James F. Henninger, President Judge, the Court of Common Pleas of Lehigh County denied the application for the Writ of Habeas Corpus.

On May 7, 1952, an appeal was taken from the order of the Court of Common Pleas of Lehigh County to the Superior Court, a Court of Appellate Jurisdiction for the Commonwealth of Pennsylvania, raising the constitutional points theretofore raised before the Court of Common Pleas.

On July 14, 1953, the Superior Court affirmed the order of the Court of Common Pleas and on August 26, 1953, a petition was presented to the Supreme Court of Pennsylvania, a Court of Last Resort in that State, seeking permission to appeal from the order of the Superior Court. Said order was denied on September 23, 1953.

REASONS FOR GRANTING THE WRIT

This Honorable Court, in the case of Powell v. Alabama, 287 U. S. 45, held that not only was one accused of a capital offense in a state proceeding guaranteed the right to the appointment of counsel but that failure to make an "effective appointment" of counsel violated the "Due Process clause" of the Fourteenth Amendment.

In that case, counsel was appointed on the morning of trial for the "Scottsboro" defendants.

This Court therein stated at page 71 of the opinion:

> ". . . We are of the opinion that under the circumstances just stated the necessity of counsel was so vital and imperative that the failure of a trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the 14th Amendment. Whether this would be so in other criminal prosecutions or under other circumstances we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." (See also, *Smith v. O'Grady*, 312 U. S. 329.)

The *Powell* case was followed by this Court in *Avery v. Alabama*, 308 U. S. 444, 446, a capital case arising in the State Courts.

This Court therein stated at page 446:

"But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

The essence of the holding of this Court in *Powell v. Alabama* was applied to non-capital cases by Mr. Justice Black in the case of *Palmer v. Ashe,* 342 U. S. 134, stating:

"This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in non-capital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense."

The attention of the Court is also called to *Uveges v. Pennsylvania,* 335 U. S. 437; *Rice v. Olson,* 324 U. S. 786; *Wade v. Mayo,* 334 U. S. 672; *Gibbs v. Burke,* 337 U. S. 773.

In *Uveges v. Pennsylvania,* Mr. Justice Reed stated that some members of this Court thought that where serious offenses were charged, failure of a Court to offer counsel in state criminal trials deprived an accused of rights under the Fourteenth Amendment. Mr. Justice Reed further stated that other members of this Court were of the opinion that in non-capital cases each case depended on its own facts. Where the gravity of the crime and other factors, such as the age and education of the defendant, the complicated nature of the offense charged and the possible defenses thereto, render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group held that the accused must have

legal assistance under the Fourteenth Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not.

In passing, it is noted that this Court in the case of *Wade v. Mayo*, 334 U. S. 672, stated that whether the failure to appoint acounsel in a non-capital case in a state Court constitutes a denial of due process under the Fourteenth Amendment does not depend on whether the law of the state requires such an appointment. (*Wade v. Mayo* was reversed by this Court in the case of *Darr v. Burford*, 339 U. S. 200, on other procedural grounds.)

This Honorable Court is urged to extend the doctrine of *Powell v. Alabama* and *Avery v. Alabama* providing for the "effective representation of counsel" to non-capital cases arising in state Courts. Such would appear to be the philosophy of this Court as evidenced by the above quoted decisions of *Palmer v. Ashe* and *Uveges v. Pennsylvania*.

In the instant case petitioner was charged under four Bills of Indictment with robbery and rape committed upon four different couples. The trial on these indictments lasted from January 6, 1943, until January 8, 1943, or a period of three days. This of itself is evidence of the complicated nature of the proceedings in the trial court. Petitioner alleged in his petition below that by virtue of the fact that an attorney was appointed for him by the Trial Court only fifteen minutes before the trial started that he, the accused, did not have adequate time to confer with counsel nor to prepare his defense, nor to summon witnesses on his behalf. The accused received a maximum sentence of fifty-five years in the penitentiary, which of itself bespeaks the gravity of the proceedings.

The Learned Trial Court *assumed* that the court-appointed counsel did everything necessary to prepare his defense within the span of fifteen minutes. Common sense dictates that in a trial of this type such would be impossible.

Where a man is incarcerated for the normal span of a human life, there can be no assumption, and supposition must give way to fact. Petitioner should have been accorded a hearing on this issue in the Court of first instance upon his petition. Certainly the duties of a court-appointed counsel to his client are none the less than those of a private advocate. The appointment by the Court of an attorney who only casually pays lip service to the defense is not a guarantee of effective counsel as set forth by this Honorable Court.

It is further urged that the position of the Courts of the Commonwealth of Pennsylvania in allowing a person accused of four separate and distinct offenses, where the evidence as to one offense is not admissible as to the others, to be tried at one and the same time with the same jury is a misconception of the rights guaranteed a person to a fair trial under the Fourteenth Amendment.

It was highly prejudicial to the petitioner to have been tried on four separate offenses at the one time. The jury having received evidence in one crime might well have concluded, without the Commonwealth having met the burden of proof, that the defendant was guilty in all crimes.

The crimes charged were in no way related. One of the crimes charged is alleged to have occurred on August 11, 1942, another on August 12, 1942; the remaining two were supposed to have been committed on September 24, 1942. In all cases the prosecuting witnesses were different persons and in no way could the facts and evidence received in one of the cases be admitted in the others.

The Learned Superior Court of the Commonwealth of Pennsylvania concluded that this did not violate any rights accorded the petitioner either under the Conustitution of the United States nor the laws of the Commonwealth of Pennsylvania.

Reasons for Granting the Writ

The rule adopted by the Courts of Pennsylvania arise out of a misinterpretation of the case of *Commonwealth v. Mulroy*, 154 Super. 410. In that case defendant was indicted for pandering and receiving bawdy money. At the same trial one Beatrice Mello was tried for keeping a house of prostitution and one Helen Welker was charged with prostitution. The Superior Court noted that as the same testimony was needed for Mello and Welker would be relevant and material in the trial of Mulroy, the cases were properly tried together. This decision was relied upon by the Superior Court of Pennsylvania in the cases of *Commonwealth v. Roberts*, 161 Super. 548; *Commonwealth v. Lehman*, 166 Super. 181, and *Commonwealth v. Kayzier*, 166 Super. 373, and was extended to cover a situation where defendant was tried for a series of distinct and separate offenses wherein the evidence as to one crime in no conceivable situation could have been admissible as to other crimes. This certainly was not the original intendment of the Superior Court of Pennsylvania in deciding the *Mulroy* case.

The courts below in passing noted that counsel for petitioner did not object to the joint trials at the time of his trial below. The mere fact that the court-appointed counsel did not object would seem to have no bearing upon petitioner's rights. This attorney was an officer of the Court. He was not a mere agent for the defendant. So prejudicial was this procedure to the petitioner, that the failure of his casual counsel to speak could not defeat his rights guaranteed him under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

REASONS FOR GRANTING WRIT

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted

Respectfully submitted,

CONRAD G. MOFFETT
Counsel for Petitioner